

## American Society of International Law

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[Why Regime Change is (Almost Always) a Bad Idea (Manley O. Hudson Medal Lecture)]

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## MANLEY O. HUDSON MEDAL LECTURE

On Friday, April 2, 2004, to a standing-room-only audience, Professor W. Michael Reisman of the Yale Law School delivered the inaugural Hudson Medal Lecture.

### INTRODUCTORY REMARKS BY LUCY REED\*

There could be no better introduction to this lecture than the Honors Committee's recommendation that the Executive Council award the Hudson Medal to Professor Reisman at the 2004 Annual Meeting:

The 2003–2004 ASIL Honors Committee recommends Professor W. Michael Reisman to receive the Manley O. Hudson Medal this year. As provided under Section III of the ASIL Regulations, the recipient of the Hudson Medal must be a “*distinguished person of American or other nationality who has contributed to scholarship and achievement in international law.*” This description is the least that can be said about Professor Reisman.

To Society members, Professor Reisman may be synonymous with the *American Journal of International Law*. His service began when he joined the Board of Editors in 1971 and ended only in 2003, after three years as editor-in-chief. At all times and in all departments, Professor Reisman insisted on the most rigorous standards of scholarship, even as he skillfully guided the *Journal* into the electronic age. His contributions to the *Journal* are all the more noteworthy for his having to labor alone—which he did gracefully and generously—when illness tragically took the life of his fellow editor-in-chief, Professor Jonathan Charney.

Looking beyond the Society, Professor Reisman is the Myres S. McDougal Professor of International Law at the Yale Law School, where he has taught hundreds of aspiring international lawyers for almost forty years. The name of his chair aptly designates a scholar who has carried forward Professor McDougal's “New Haven School” of international law. This started with collaborative efforts, such as the compendium entitled *International Law in Contemporary Perspective* (1981) and *International Law Essays* (1981). But Professor Reisman's extraordinary corpus of writing extends far and wide beyond the scope of his predecessor's approach. In the course of writing some twenty books and over two hundred and fifty articles and book reviews, Professor Reisman has turned his keen intellect to the analysis of far-reaching topics in jurisdiction, national security, public and private dispute resolution, the law of war, human rights, and investment disputes. His Hague Lectures are set out in the substantial volume *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication* (1997).

Professor Reisman stands out as a scholar whose achievements extend beyond the walls of the academy. He has put theory into practice in many influential roles, including as president of the Inter-American Commission on Human Rights; president of the Arbitral Tribunal for the Bank for International Settlements; member of the UN Boundary Commission for Eritrea and Ethiopia; and arbitrator and expert in countless international arbitrations.

Space does not allow for a full catalog of Professor Reisman's other professional achievements: his endowed lectureships, his Society vice-presidency, his roles in the International Law Association and the Council on Foreign Relations, his prizes and awards. But space must be saved for this: However impressive his scholarship and professional achievement, Professor Reisman has most impressed us with his seemingly unlimited reserves of patience, good humor, tolerance, curiosity, and genuine concern for family, students, and colleagues.

In recognition of Professor Reisman's contribution to scholarship and achievement in international law, the Honors Committee recommends him as the recipient of the 2004 Manley O. Hudson Medal.

\* Freshfields Bruckhaus Deringer LLP; Chair, 2003–2004 ASIL Honors Committee.

**MANLEY O. HUDSON MEDAL LECTURE:****WHY REGIME CHANGE IS (ALMOST ALWAYS) A BAD IDEA***by W. Michael Reisman\**

Every impulse to protect the weak and help the infirm is noble. The impulse to use the means at our disposal to liberate a people from a government that poses no imminent or prospective threat to us but that is so despotic, violent, and vicious that those suffering under it cannot shake it off is also noble.<sup>1</sup> The action that gives effect to that impulse may sometimes be internationally lawful. It may sometimes be feasible. It is often—but not always—misconceived.

## I.

While we owe the currency and, for many, the notoriety of the term “regime change” to George W. Bush and his advisers, regime change in its modern usage—the forceful replacement by external actors of the elite or the governance structure of another state so that the successor regime approximates some international standard of governance—is hardly their creation. States have long meddled in the politics of other states in order to change the governments there to their own liking, whether in pursuit of some revolutionary political, racial, or religious ideology, out of fear, or out of sheer lust for power. Because there is no such place as the “international arena” but only the territories of states, much of what diplomats rather grandly style “international politics” has always involved using the essential tools of statecraft, which include thuggery and bribery and messing about in other states. As long as war was lawful, regime change was fair game. Almost everything was.

Key principles of modern international law, as expressed in the United Nations Charter and many other authoritative instruments, have adapted the concept of sovereign equality of states so as to erect a substantial barrier against regime change.<sup>2</sup> Stripped of its mystical moss, sovereignty in its modern sense is simply the demand by each territorial community, however small and weak and however organized, that it be permitted to govern itself without interference and meddling by larger or more powerful states and, at least in 1945, without interference by the entire organized international community. Our international legal system is scarcely imaginable without such a concept of sovereignty, and it is difficult to conceive of a system based on sovereignty that would tolerate regime change.

But modern international law has also installed a major imperative *for* regime change: internationally guaranteed human rights. Do not deceive yourselves: The central concern of modern international human rights law is not with problems on the order of whether men who wish to wear their hair long or pierce their ears can serve in the military. It is concerned with how to transform regimes in which the essential means of governance are repressive terror and torture into regimes that approximate human rights standards. A major purpose of the International Criminal Court is to indict culpable *sitting* heads of state, a purpose that necessarily, and not coincidentally, imports regime change. The indictment by the Sierra Leone Tribunal of Charles

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<sup>1</sup> I am not considering regime change ancillary to a lawful self-defense action. On this, see W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97AJIL 82 (2003).

<sup>2</sup> See, e.g., UN CHARTER Arts. 24, 26, 39; General Assembly Declaration on Principles of International Law Concerning Friendly Relations, G.A. Res. 2526, 25 UN GAOR Supp. (No. 28) at 121, 123, 124, UN Doc. A/8028 (1970). See also W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 191–97 (1988).

Taylor, then the elected President of Liberia, is a clear example of purposive international regime change<sup>3</sup>; the indictment of Slobodan Milosevic by the Former Yugoslav Tribunal is another.<sup>4</sup>

In an important statement, Kofi Annan said, “State sovereignty, in its most basic sense, is being redefined . . . States are now widely understood to be instruments at the service of their peoples, and not vice versa.”<sup>5</sup> Because the international human rights program, stripped of its more recent mystical overlay, is based on the notion that, in the crunch, human beings and not states matter, the internal organization and modes of governance of each state must now meet certain prescribed international standards or be changed, sovereignty notwithstanding.

Regime change is a more radical claim than “humanitarian intervention,” which has lately acquired a degree of legal acceptance long denied it. Nevertheless, both claims resonate to some of the same policies. Humanitarian intervention is a short-term intervention aimed only at stopping massive, continuing human rights violations. Once the violations cease, there is no longer a justification for it. A regime change may try to justify itself by invoking past human rights violations, but it is in fact future-oriented—it is conducted to change the structure or the personnel of a government, or both.

## II.

An antinomy is caused by two contradictory norms. There is a fundamental contradiction between the legal principles of state sovereignty and human rights. I believe that modern international law has resolved this antinomy in the following way: State sovereignty prevails in all but the most egregious cases of widespread human rights violations, then multilateral or, in extreme cases, unilateral action may be taken to secure an immediate remedy or even to change a regime—if need be, forcibly. A review of practice shows that when the facts warrant it, even the most legalistic lawyers, diplomats, and politicians, after struggling with different rationalizations, generally conclude that forcible action, though not always internationally authorized, was the right thing to do.

These contradictory principles do not produce a tidy jurisprudence—antinomies do not allow for that—but they have allowed international lawyers to distinguish between lawful and unlawful regime changes, as a few examples from recent memory will show:

- In 1968, the Security Council applied Chapter VII of the UN Charter against the white minority government of Rhodesia on the ground that it was a threat to the peace.<sup>6</sup> Internally, the Smith regime was certainly pathological but hardly pathogenic, in the sense of threatening other states.
- With UN and OAS blessings, the United States invaded Haiti to oust the military dictatorship and to reinstate the elected government of Jean Bertrand Aristide.<sup>7</sup> The Security Council characterized the Cedras regime as a threat to the peace, but, though it was brutal, it posed no external threat. Nor did the government of elected President Aristide in this year’s internationally authorized regime change.
- In contrast, the Taliban government, which was characterized as a threat by the Security Council,<sup>8</sup> demonstrated rather vividly that it indeed was one. The regime change in

<sup>3</sup> Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I (Special Ct. for Sierra Leone, Mar. 7, 2003) (indictment), available at <<http://www.sc-sl.org>>.

<sup>4</sup> Prosecutor v. Milosevic, Case No. IT-99-37 (Int’l Crim. Trib. for the Former Yugoslavia, May 22, 1999) (indictment), available at <<http://www.un.org/icty/indictment/english/mil-ii990524e.htm>>.

<sup>5</sup> Kofi A. Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, available at <<http://www.un.org/News/oss/sg/stories/kaecon.html>>.

<sup>6</sup> S. Res. 253, UN SCOR, 1428th mtg. at 5–7, UN Doc. S/Res. 253 (1968).

<sup>7</sup> S. Res. 940, UN SCOR, 3413th mtg. at 2, UN Doc. S/Res. 940 (1994).

<sup>8</sup> S. Res. 1378, UN SCOR, 4415th mtg. at 2, UN Doc. S/Res. 1378 (2001).

Afghanistan, which seeks to replace the Taliban with the transitional government of President Karzai and a durable constitutional order, is still being played out.

Regime change has not been limited to United Nations initiatives. In the mid-1970s international legal discourse was dominated by concerns about Nicaragua. The United States began to withdraw its support from the Somoza government in Nicaragua, against which ranged what appeared to be a broad-based and democratically inspired Sandinista Liberation Front (FSLN). In 1977 the U.S. terminated military assistance and pressed other states, notably Israel and Guatemala, to stop supplying armaments to Somoza. The U.S. went further, initiating a resolution by the OAS calling for "the immediate and definitive replacement of the Somoza regime."<sup>9</sup> The traditional resistance of Latin American leaders to any outside intervention of this sort was apparently mollified by evidence that Anastasio Somoza had tried to arrange the assassination of another head of state.<sup>10</sup> The OAS resolution was conditioned on agreement by the Sandinistas to support a democratic, pluralist, and nonaligned government. The FSLN cabled its agreement on July 12, 1979. It was the creation of a Marxist state by the Sandinistas, in violation of that commitment, that led the United States to support the contras in the long war that followed—a war that was only terminated when the Sandinistas, under international pressure, allowed free and internationally supervised elections and were voted out of office.

Some ten years later, the OAS Ministers condemned the usurpation of an election in Panama by General Manuel Noriega on the grounds that it "involves internal and external factors . . . and could seriously endanger international peace and security."<sup>11</sup> Although the OAS General Assembly had urged "all states to refrain from taking unilateral action,"<sup>12</sup> the first Bush administration invaded Panama, put the recently elected government in place, and seized, tried, and convicted Noriega, who is now confined in a federal penitentiary.

During the same period, there were many other unilateral and entirely unauthorized regime changes. The year 1979 alone witnessed four of them:

- Tanzania invaded Uganda and replaced the Idi Amin dictatorship with a government led by a former elected president.
- France invaded what was then known as the Central African Empire, imprisoned the self-styled emperor, Jean Bedel Bokassa, and put in power a former president, David Dacko, who had conveniently been residing in Paris.
- Vietnam invaded Cambodia, expelled the Khmer Rouge government from Phnom Penh, and put Hun Sen in power.
- The Soviet Union invaded Afghanistan, made Babrak Karmal president and later replaced him with another puppet.

None of the regime changes in 1979 had prior international authorization, yet it is my impression that, except for the Soviet invasion of Afghanistan, all the unilateral regime changes were met with approval from the international community.<sup>13</sup> Of the four countries that initiated these changes, only the U.S.S.R. remained substantially present in the country it had invaded. The United States objected to the Hun Sen government in Phnom Penh because it was backed by Hanoi and in one of the more bizarre marriages of political convenience, steadfastly supported the Khmer Rouge government as the properly credentialed representative of Cambodia in the

<sup>9</sup> Res. II, June 23, 1979, adopted at the 17th Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II, doc. 40/79, rev.2.

<sup>10</sup> See SHIRLEY CHRISTIAN, *NICARAGUA: REVOLUTION IN THE FAMILY* (1985).

<sup>11</sup> AG/RES 990/89.

<sup>12</sup> AG/RES. 990 (XIX-0/89) Nov. 18, 1989.

<sup>13</sup> See 34 UN GAOR at 2, UN Doc. E.S. 6/2 (1980) (The General Assembly consistently condemned the Soviet invasion.)

UN. Most of the rest of the world seemed to think that, whatever the mix of Hanoi's motives in changing the regime in Phnom Penh, ending the nightmare of Khmer Rouge rule was meritorious.

In 1982, Israel invaded Lebanon and tried to put Bashir Gemayel in power. Within days, Gemayel was assassinated by a massive bomb and the Israeli plan fell apart. Although there was no indication that Israel planned a long-term occupation of Beirut, it seemed clear that Israel believed that a Gemayel government would be friendly and possibly dependent. The Israeli attempt at regime change was virtually universally condemned.<sup>14</sup>

These are only a few relatively recent examples.<sup>15</sup>

In some of these regime changes, efforts were made—with varying degrees of conviction and of success—to develop an international legal case supporting the action. In others, the states involved cultivated an unshakable ignorance. In 1919, for example, as the Allied Powers sought to change the Bolshevik regime in Russia, Winston Churchill observed sarcastically:

Were they at war with Soviet Russia? Certainly not; but they shot Soviet Russians at sight. They stood as invaders on Russian soil. They armed the enemies of the Soviet Government. They blockaded its ports, and sank its battleships. They earnestly desired and schemed its downfall. But war—shocking! Interference—shame!<sup>16</sup>

In still other regime changes, the actors seemed to be following the lapidary advice of Philander Knox, Attorney General to President Theodore Roosevelt. When Roosevelt wondered whether a legal argument should be framed to justify the U.S. role in the secession of Panama from Colombia and the Canal Treaty (a major and internationally controversial regime change of the time), Knox responded, “Oh, Mr. President, do not let so great an achievement suffer from any taint of legality.”<sup>17</sup>

Iraq is, of course, the Mother of All Regime Changes. The justifications that have been invoked for the intervention have ranged from noncompliance with UN Chapter VII resolutions, through preemptive self-defense against existing weapons of mass destruction (or, latterly, the intention and ability to assemble and use them), through being an integral part of the war against terrorism, and, belatedly, to relieving the Iraqi people of vast and continuing human rights violations. To a large extent, arguments about this kaleidoscope of reasons have been eclipsed by the exigencies of actually implementing the regime change in Iraq. On September 23, 2003, Kofi Annan, whose lack of sympathy for the American initiative had been manifest, said to the UN General Assembly that: “Whatever view each of us may take of the events of recent months, it is vital to all of us that the outcome is a stable and democratic Iraq—at peace with itself and with its neighbors, and contributing to stability in the region.”<sup>18</sup>

The ultimate outcome of the events in Iraq will affect attitudes toward future regime changes, and much more, in international law.

### III.

International lawyers who prioritize state sovereignty have consistently condemned all regime changes; international lawyers who prioritize human rights have been more selective in

<sup>14</sup> 1982 UN Y.B. 428, UN Sales No. E.85.I.1.

<sup>15</sup> I am not analyzing Cold War regime changes, such as the Kennedy administration's abortive invasion of Cuba in 1961, which sought to replace the Castro government; or the Johnson administration's invasion of the Dominican Republic to reverse a popular coup and install a government led by the perennial President Balaguer; or the Reagan administration's invasion of Grenada to suppress a coup that was accomplished by murdering an elected leader; or the Soviet Union's various regime changes in Central Europe; or China's in Tibet. It is impossible to extract many of these incidents from the distortions that the Cold War inflicted on international law.

<sup>16</sup> WINSTON S. CHURCHILL, *THE AFTERMATH* 243–44 (1929).

<sup>17</sup> TYLER DENNETT, JOHN HAY: *FROM POETRY TO POLITICS* 381 (1933).

<sup>18</sup> Available at <[http://www.fcni.org/issues/item.php?item\\_id'494&issue\\_id'35](http://www.fcni.org/issues/item.php?item_id'494&issue_id'35)>.

their condemnation as well as their approbation. The international community, by which I mean the broadest range of official and unofficial international and national decision makers whose expectations and demands are a critical part of modern international law, has taken a nuanced view of each case based on a range of critical international legal policies, including human rights, and local and regional stability. The lawfulness of each instance of regime change has been appraised in terms of its accomplishment of those policies.

I suggest that the most important criteria of this appraisal were that (i) the existing government (the target of regime change) was, cultural differences notwithstanding, widely condemned as pathological, if not pathogenic; (ii) the intervening state did not plan to use the change of government it was effecting to permanently increase its influence within that state and its region; (iii) the change was feasible; (iv) the change could be accomplished within a reasonable amount of time; and (v) over the long term, the quality of internal order after the regime change was likely to be improved.

None of the regime changes scored well on all these criteria, but those that seemed to have been deemed lawful scored high on the first, second, and third. In the midterm, none of the changes proved dazzlingly successful, in the sense of establishing a reasonable and decent internal system of public order. Indeed, some of the states descended into prolonged chaos. But many of the regime changes, for all their faults, were, as in Cambodia, preferred by key members of the local population over the government that had been replaced.

#### IV.

The human rights instruments provide a template of domestic governance that, alas, is not achieved in many states. The constitutive question is who should decide and implement that template. In systems of human indignity, most would agree that human rights transformations are best accomplished autochthonously, without external intervention and especially without unilateral intervention. If there must be intervention, it should be persuasive rather than coercive, indirect rather than direct, and inclusively authorized and accomplished rather than exclusively and unilaterally effected. But the best is not always possible.

In 1995, in his Supplement to an Agenda for Peace, then UN Secretary-General Boutros-Ghali observed that:

One of the achievements of the Charter of the United Nations was to empower the Organization to take enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression. However, neither the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control operations for this purpose, except perhaps on a very limited scale.<sup>19</sup>

After reviewing the modalities available to the United Nations—"preventive diplomacy and peacemaking; peace-keeping; peace-building; disarmament; sanctions and peace enforcement"—Boutros-Ghali went on to say that: "The United Nations does not have or claim a monopoly of any of these instruments. All can be, and most of them have been, employed by regional organizations, by ad hoc groups of States or by individual States."<sup>20</sup>

The Agenda for Peace, which was crafted at a moment of international optimism, was striking for its acknowledgment of this political reality. In the best of all possible worlds, the optimum way of using the military instrument in defense of the values of world order is through authorization by the Security Council, acting in conformity with the procedures of the UN

<sup>19</sup> Supplement to an Agenda for Peace, Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1, para. 77 (Jan. 3, 1995).

<sup>20</sup> *Id.* at para. 23.

Charter. Who better than a UN Secretary-General would know that we do not, alas, inhabit the best of all possible worlds?

It is not always possible to achieve the values of international law and of the Charter itself through the Security Council and Charter procedures. Thus, Kofi Annan, in the context of NATO's internationally unauthorized bombardment of Serbia, observed that it was "tragic . . . but there are times when the use of force may be legitimate in the pursuit of peace."<sup>21</sup> Later, he said:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?<sup>22</sup>

I would think that anyone who cares deeply about the protection of human rights will want to preserve the strategy of unilateral regime change as an extraordinary remedy in dark days and hours in which the formal international system cannot operate in time—or cannot operate.

## V.

Ironically, just as international law had uneasily begun to accommodate itself to regime change as an exceptional lawful remedy, successful regime changes, whether nationally or internationally initiated and supervised, have come to seem less and less feasible. The reasons for this relate to fundamental and interstimulating changes in weapons technology, their proliferation, the asymmetry of adversaries, and the decay of much of the law of armed conflict. The current situation in Iraq is instructive but hardly unique.

In environments as different as Peru during the Shining Path insurrection and Sri Lanka during the continuing insurrection of Tamil Eelam, it has become painfully clear that a relatively small but highly organized force is capable of bringing a very large heterogeneous country to a state of paralysis. Shining Path never numbered more than twelve thousand people in a country of more than twenty-five million; Tamil Eelam had less than twenty thousand in a country of nineteen million. In both cases, a coherent counter-ideology, intense discipline, ruthlessness in the selection of targets and the execution of operations, and the inculcation of an ethos of self-sacrifice were sufficient to counter the forces of a much larger body politic. This *modus operandi* (MO) has been tested under fire, and it works.

Faced with an adversary using this MO, a forceful response by the targeted government or its allies is often counterproductive, for it drives more of the general population to the adversary. A more discriminating response that cannot, in the circumstances of these types of internal conflict, avert collateral damage is sure to be decried by those parts of the international human rights community that focus on human rights deprivations by governments rather than human rights deprivations per se. Shining Path was neutralized, at least temporarily, by the fortuitous apprehension of its leader, Abimael Guzman. Tamil Eelam is still effective.

The Iraqi imbroglio demonstrates that precisely the same strategy can be mounted against a regime change. It is tempting to believe that had the United States action against Iraq been international rather than effectively unilateral, one blessed by or even directed by the United Nations, the outcome would have been different. I wish it *had* been truly international but I doubt that the result would have been different. Even if the so-called coalition of the willing

<sup>21</sup> Secretary General's Statement on NATO Military Action Against Yugoslavia, M2 PressWIRE (Mar. 25, 1999), available at LEXIS, Market Library, lacnws File.

<sup>22</sup> Secretary-General Presents His Annual Report to General Assembly, Press Release UN Doc. SG/SM/7136 GA/9596 (Sept. 20, 1999).

had been much broader than it was in fact, and the actual military contribution of the United States had been minimal or merely supportive, there is no reason to assume that those in or entering Iraq who are opposed to the regime change, this mysterious “counter-coalition of the willing,” would be acting differently than they are now. The brutal destruction of United Nations headquarters in Baghdad on August 19, 2003, demonstrates with hideous vividness that (as those who have carefully studied UN peace-keeping operations knew) the symbol of the United Nations is not necessarily positive or effective with all local groups and factions in this type of conflict. The blue helmet, by itself, provides no protection against individuals and groups who calculate that a UN action is going to oust them from or severely reduce their power.

In a technological- and science-based civilization, modes of warfare evolve as each side looks for an edge. Your advances are called military evolution; your adversary’s advances are called asymmetrical warfare. The asymmetric development exemplified by the Iraqi strategy demonstrates a fact about military power in the modern world that the United States (and, for that matter, Russia in Chechnya) has resisted accepting and that has broad implications for all efforts at regime change. The enormous American military power translates into “fate control,” but not “behavior control.” The United States is capable of obliterating an adversary, as a theoretical if not a practical matter, but it is effectively unable to control the adversary’s behavior. It is certain that the United States could completely destroy Iraq in a few hours. It is not certain that it can, at a nationally or internationally acceptable price, control Iraq’s behavior.

There are long-term implications here for regime change, not to speak of other forms of international peace-keeping and peace-enforcement. Regime change requires regime changers, for which there may be fewer and fewer volunteers. Even if there is ultimately a satisfactory solution in Iraq—and I believe that, though it is proving more costly than anticipated, it is more likely in Iraq than in Afghanistan—the United States, for one, will not soon engage directly in an elective rather than a self-defensive regime change. The American public will be ill-disposed to support it; the persistence of popular support for the action in Iraq apparently derives from a perception that the action is related to self-defense and not to regime change per se. Nor is it certain that the United States will be able to maintain a sufficiently large and effective volunteer and reserve force if prospective volunteers believe that their mission is no longer defense of the nation but the grueling task of changing regimes in other states.

## VI.

When the moral case is strong and regime change appears lawful and feasible, is a military action to accomplish it wise? Is it the right thing to do? In most cases, I would suggest, it is not, for diverse moral and political reasons. Let me review them briefly.

First, it is easy to conclude that a regime is wicked and violent. It is difficult and indeed culturally arrogant to determine what sort of workable regime should replace it. But once a regime has been ejected and the territory controlled, the regime changers cannot say “mission accomplished” and fly off. They must supervise a transformation. Their own model may not fit the local political culture or cultures. Leon Trotsky, the first Commissar for Foreign Affairs after the Bolshevik Revolution, believed that after a few proclamations, all peoples would overthrow their rulers and establish communist governments. We now hear a democratic Trotskyism which, *mutatis mutandis*, assumes the same. Both of these theories ignore the persistent force of nationalism, culture, religion, language and other powerful—and manipulable—focuses of identity.

The great human rights instruments, of course, establish an international standard of governance. In practice, however, the standard is expressed in very general principles and norms, and the “margin of appreciation” can be quite elastic. In theory, a plebiscite is the most reliable

method of testing what a given group wants, but elections presuppose a minimum internal and external agreement about what is to be decided in the elections. As for “governments of national unity,” because they are a euphemism for dividing the spoils among the strong and not among the deserving or virtuous, they may not change the regime at all.

Second, the United States has global interests and responsibilities that are omnipresent. For all its overwhelming power relative to other states, it would not have enough military and political resources for all its interests and responsibilities if all or most suddenly required external action. In this respect, the United States is like a bank with vast but, relative to claims, always limited reserves. They are always in danger of being overdrawn if all are called at once. A bank, no matter how great its reserves, avoids a run by projecting an image of solvency because it knows that the moment that image is undermined, everyone draws down his account. Regime changes are calls on military assets, calls whose limits are difficult to gauge.

Third, the process of regime change may put great strain on the economic resources of the changer and its national economy. The longer and more widespread the economic strain, the more tenuous domestic support for the regime change becomes.

Fourth, in liberal societies all mobilizations for coercive action have, as an ineluctable consequence, a constriction of civil liberties at home, which increases in direct proportion to the length of the action and, independently, the extent to which the adversary is able, credibly, to bring the threat of violence home.

Fifth, regime changes are likely to take a great deal of time but the tolerance for the changer is limited. An outsider is always an outsider. An army of liberation becomes an army of occupation the moment it wins. As an army of occupation, it encounters more and more resistance the longer it stays.

Sixth, a coordinate principle operates with respect to the regime changer. With the predominant power it enjoys, the United States seems to be the ultimate regime changer, but, for all of its power, it does not have an aptitude for extended control over reluctant states. In no instance has public support for an occupation that started out with good intentions, whether in the Philippines, Haiti (on more than one occasion), or Nicaragua, been sustained. Yet regime changes are not likely to be short-lived, for the regime that is targeted for change has usually spoliated the political and economic system of the state it controlled, leaving it in shambles.

Seventh, the new MO of resistance is likely to drain the regime changer and frustrate its intentions, leading to greater and greater violence, more and more alienation of the local population, and stronger resistance to the putative regime changer.

The conditions for successful regime change are very difficult to meet, all the more so because the governments of democratic political systems, whose militaries are required for regime changes, will have to present their participation in the action to their constituents as being in the national interest or a matter of self-defense. This is, after all, the issue that most affects electors and taxpayers. Tocqueville's keen observation is still relevant: “It is an arduous undertaking,” he wrote, “to excite the enthusiasm of a democratic nation for any theory which does not have a visible, direct and immediate bearing on the occupations of their daily lives.”<sup>23</sup> This form of argument will run against demonstrating to outsiders that there is no national interest in the action.

Moreover, the prospect of long-term occupations over increasingly restive populations—in which adversaries will use methods characterized as terrorist, but which they and their supporters view as simply intelligent, and asymmetric warfare, all military and paramilitary efforts against which will be subjected to intense scrutiny by international criminal courts and nongovernmental custodians of human rights—will lead many governments to think twice before getting involved.

<sup>23</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (George Lawrence, trans.) 642 (2000).

## VII.

The title of this lecture is “Why Regime Change Is (Almost Always) a Bad Idea.” I would like to turn now to the parenthetical “almost always.” There will be times—“dark days and hours,” to quote Kofi Annan again—when an individual state must undertake to forcefully change the regime in another state because that regime is both hideous and dangerous, pathological and pathogenic, and because the formal decision structures of the international legal system prove inoperable.<sup>24</sup> When a state must engage in regime change, here are ten guidelines for success that may be deduced from earlier and current cases:

- 1) There should be as much support from international organizations as possible.
- 2) If a regime change is not formally authorized by the UN, there should be significant foreign support (especially in the states contributing forces) for the regime change.
- 3) There should be significant domestic and internal support for the regime change in both the would-be changer and the targeted state.
- 4) The elite that is the target of regime change should not have an effective internal base of support.
- 5) There should be an acceptable and readily available alternative government that promises to be effective, so that, ideally, all that is involved is regime *change*, not regime reconstruction or nation-building.
- 6) The occupation by an outside force should be short.
- 7) The costs to the outside force should be minimal.
- 8) The force accomplishing the regime change should not be believed, by those within the country or outside of it, to have a parochial interest in securing the regime change.
- 9) The earlier recommendation notwithstanding, where nation-building is an inevitable part of the regime change, the United Nations should be responsible or prominently involved, as in Namibia, East Timor, and Kosovo. The UN commitment should be secured before the regime change.
- 10) Do not forget Murphy’s Law. As in all elective uses of force, the Powell Doctrine should apply.<sup>25</sup>

You will observe that I have tried to sever regime change from nation-building. Obviously, it would be best to oust a vicious government and transform the system of governance into something approximating a normative international standard, but, as Voltaire reminds us, the best is the enemy of the good. Aside from the fact that externally designed and managed nation-building, even under the auspices of the United Nations, can easily become an arrogant usurpation of the right of self-determination, it is enormously difficult, costly, and time-consuming. Regime change, when it is necessary, should focus narrowly on regime change.

Regime changes will be most difficult when there is no likely successor and no coherent internal political process that can produce an effective and acceptable candidate. and when as a result the occupation will be extended and expensive. Thus, some situations may call for other strategies. When alternative strategies are available, coercive regime change should only be essayed when it promises to be successful, for the stabilizing use of military force in international politics is essentially one of expectations—it is based on reserves that are always overdrawn.

<sup>24</sup> The reasons necessitating such action may include massive AIDS epidemics that cause the breakdown of internal order, posing external threats as well as internal human rights crises.

<sup>25</sup> Colin L. Powell, *US Forces: Challenges Ahead*, 71 FOREIGN AFF. 32 (1992), available at <<http://www.pbs.org/wgbh/pages/frontline/shows/military/force/powell.html>>.

## VIII.

Regime change may seem necessary even when the conditions are not propitious, the costs are unknowable but likely to be high, and durable international support is uncertain, but that is not always the case. In each context, let the strongest and best-intentioned government contemplating or being pressed to undertake regime change remember that not everything noble is lawful; not everything noble and lawful is feasible; and not everything noble, lawful, and feasible is wise.

**LECTURE COMMENTARY:  
REGIME CHANGE AND THE CHANGING UNIVERSE OF VALUES  
IN CONTEMPORARY INTERNATIONAL LAW**

*by Rudolf Dolzer\**

Professor Reisman's brilliant lecture has set forth a thoughtful and differentiating framework within which the notion and the modalities of forceful regime change can be assessed from a legal perspective, from the point of view of policy-making, and also in view of the conditions of practical success of an effort to bring about regime change under the constraints as they may exist on the ground in the targeted country.

The primary focus of Professor Reisman's analysis is on regime change per se, not on considerations that may prompt the initiative for regime change, such as prevention of mass killing, the need to contain the proliferation of weapons of mass destruction, the fight against terrorism, or the effort to avoid a failed state with all its disruptive ramifications. Thus, the underlying assumption of Professor Reisman's approach is that in principle the notion of regime change is subject to meaningful analysis, notwithstanding the manifold circumstances and objectives that may prompt it.

An obvious reason why a discussion on regime change per se is not just legitimate but also required lies in the fact that the term and the concept have gained so much currency in public discussion and in state practice that a legal approach has become necessary if there is to be a framework by which the concept can be measured from a legal perspective. A second reason in favor of a general inquiry into the modalities of regime change per se relates to issues and concerns that are cross-cutting for all variations of regime change. More fundamentally, a discussion is required if whether regime change per se must always be deemed unlawful under international law or whether there may be circumstances under which force to bring about regime change may be considered to be lawful.

Professor Reisman's lecture points to a number of instances in which regime change was effected in the past decade, indeed a remarkably high number. One possible assessment of this factual side will conclude that regime change forms part of international expectations and demands and thus cannot be considered unlawful under international law. Professor Reisman's well-known view of the international legal process and the methodology of the sources of international law will in principle accept such an approach, as is apparent from his lecture. In contrast, the mainstream classical methodology that is still dominant today in Europe will point to traditional notions of sovereignty, sovereign equality, and nonintervention and a narrow understanding of self-defense; on this basis its adherents would reject any argument that would permit forceful regime change.

In my own view, contemporary international developments allow and possibly require an analysis of the current state of relevant international law in a more differentiating manner.

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My starting point is, on the one hand, that the UN Charter has to be accepted as the central constitutional agreement and source of international law and, on the other, that the Charter itself has been subject since 1990 to a dynamic process of adjustment that has reflected the absence of those restraints on the understanding and practice of the Charter and international law that existed in the bipolar world during the era of communism in the Soviet Union and its satellite states. The UN Charter in its current version is flexible enough to permit effective international responses to global challenges that were not recognized as such in 1945 or that could not then be effectively addressed. This view is based, in a condensed version, on the assumptions that:

- The UN Charter was not drafted to protect sovereignty absolutely—as is apparent, for instance, from its novel insistence on human rights (Arts. 1, 55) and enemy states (Art. 53, 107).
- The strict concern until 1990 with sovereign rights as a value in itself reflected the peculiar conditions of the bipolar world during the cold war.
- The full universe of values embodied in the Charter, including human rights, could unfold only after the collapse on the Soviet Union and its emphasis on sovereignty as coupled with the rejection, in practice, of human rights.
- The subsequent dynamic process after 1990, opening a new international legal process consistent with the original values embodied in the Charter today allows and requires an understanding of the UN Charter based on a balancing of the values of sovereignty, sovereign equality, and nonintervention on the one hand, with the importance of human rights and emerging values of the same international priority recognized by the UN Charter on the other hand.
- This value-based understanding of the UN Charter was in principle recognized in 1970 by the International Court of Justice in the *Barcelona Traction* decision, which is based on the concept of a hierarchy of values embodied in international law in which sovereignty and sovereign equality are not ranked higher than basic human rights.
- From a contemporary perspective, global security interests will enjoy the same rank as the prohibition of the use of force and basic human rights, and the jurisprudence in *Barcelona Traction* must be correspondingly adapted.
- The international community has recognized in principle since 1990 that the democratic form of government is the only legitimate one<sup>1</sup> and that this position was expressed in Res. 55/96 of the UN General Assembly.
- The process of realignment and adjustment of international law based on the new universe of values, as reflected in the original Charter, has already been reflected in the action by Western countries in Kosovo and, as pointed out by Professor Reisman, in a statement of the UN Secretary General in respect to the problem of mass killings, with these actions and statements being unexplainable in the now obsolete cold war concept of the role of state sovereignty.

In sum, these developments warrant the conclusion that a state's sovereign right to determine its domestic political system is still recognized by international law but that this expression of sovereignty today shares its high rank with other values, such as protection of basic human rights, the need to prevent mass killings, protection against terrorism, and the need to contain the dangerous spread of weapons of mass destruction. Whenever a conflict occurs between

<sup>1</sup> Recognition of good governance is not only a demand of donors in their concepts of providing aid; the UN and African leaders have expressed the same position. See UN GAOR, 55th Session, UN Doc. A/RES/55/2 (Sept. 18, 2000), Statement at the 35th Ordinary Session of the OAU Assembly of Heads of State and Government, Algiers, Algeria (July 13, 1999); Declarations, Assembly of the African Union, Second Ordinary Session, Maputo, Mozambique, Decision on the Report of the Interim Chairperson on the Conference on Elections, Democracy and Good Governance, Doc. EX/CL/35 (III) (Dec. 18, 2003): "The Assembly: (. . .) Underscores the importance and role of democracy and good governance in economic and social development and reaffirms the commitments of the Union in this respect."

these values, a process of balancing will have to determine the priority of values within the circumstances of each situation. The European tendency to emphasize effective multilateralism and preventive diplomacy coupled with an absence of credible military power does not offer a guarantee for peace, order, and stability in all situations. Under certain extreme circumstances, this process of balancing may result in the legality of forceful regime change if that offers the only effective way to protect values with the same rank and weight as is accorded to all expressions of state sovereignty.

In this context, a renewed emphasis on the full universe of values embodied in the Charter of the United Nations is bound to go beyond the recognition of equal rank of the “*Barcelona Traction* values” and will also impact the legal consideration of voting in the Security Council. In short, a veto cast by a permanent member of the Council that stands in demonstrable opposition to the values embodied in the UN Charter will not be given the same weight as a vote that is consistent with these values. Historically, it has been nearly forgotten that the power of veto was introduced in the deliberations on the Charter by Stalin, whose central concern was to evade any scheme that would bind the Soviet Union to majority voting in the Council; given the specificity of Communist values and their contrast to a philosophy of popular majoritarian vote and to human rights, Stalin’s adamant insistence on the right to veto was not surprising. The other major powers accepted Stalin’s position to secure the Soviet Union’s acceptance of the Charter as a whole; originally, they had been in favor of the principle of a majoritarian scheme of voting in the Security Council.

What is more important for a contemporary analysis of the UN Charter is the wording of Art. 24 of the Charter, according to which the Security Council “shall act in accordance with the purposes and principles of the United Nations” and the principle that all member States shall fulfil their obligations under the Charter in good faith (Art. 2 sec. 2 of the Charter). Together, these norms indicate that a state’s exercise of its veto power is not without limitations; it must be consistent with the purposes and principles of the Charter.

It will not be doubted today that the observation of human rights, the prohibition of mass killings, and containment of the dangers emanating from uncontrolled spreading of weapons of mass destruction and from terrorism in their entirety form the body of values that are embodied in a contemporary perspective of the purposes and principles of the Charter. Such a value-oriented framework of the powers granted to the members of the Security Council, based on the text of the Charter, will find a normative expression in case a vote by a member collides with those values. This would be relevant in a case, for instance, in which a permanent member uses its right to veto simply to protect a befriended state that is engaged in mass killing and is to be sanctioned by the Security Council. Under such circumstances, subsequent measures by states to prevent such mass killing would not be subject to the verdict of illegality, the veto cast in the Security Council notwithstanding, because a veto of that kind would be inconsistent with the purposes and principles of the United Nations as interpreted today. It would not carry the same legal weight as a veto that would not run afoul of the obligations of member states under Art. 2 (2) and Art. 24.

A further comment concerns Professor Reisman’s general caution in laying down specific circumstances that would require regime change. Here, I offer two observations that highlight the complexity of any concept of regime change because they point in different directions and thus may appear to militate against each other.

As Professor Reisman elaborates, none of the efforts to change a regime from outside has been clearly successful. Thus, regime change is an art still to be mastered.<sup>2</sup>

<sup>2</sup> Of course, we may study the experience of introducing democracy in Germany and in Japan after 1945, but here we must take into account that, after their total military defeat, no powerful interests within these two countries were strong enough to pose any danger to the regime changer. Nor was there any sympathy whatsoever left for the ousted regimes in the region or in the world, while there was a positive desire on the part of the population in the country to build a new regime. None of the more recent efforts to change a regime took place under such circumstances, and none were prepared by the international community as well as were the changes in Germany and Japan in 1945.

It would be instructive in this context to study the experience of the World Bank and the International Monetary Fund (IMF) in their efforts to promote development. In the past decade, these efforts went beyond individual projects and credits and even beyond the formulation of macroeconomic policies. Under the heading of "good governance," not just the efficient allocation and delivery of resources and services but also the rule of law, democracy, and human rights were recognized.

The practical experience in Africa in the 1980s led the World Bank to the conclusion that, in the absence of institutions capable of fostering and willing to foster these concepts, developmental policies could not have sustained success. A very pragmatic comparison with the experience of countries in Asia and in Latin America clearly pointed in this direction.

The next step was, then, an effort to deal on the ground with these issues and to operationalize the requirement of "good government." In essence, of course, this challenge in many countries amounted to regime change, though through peaceful instruments and means. This effort is under way. In an agreement concluded in 2000 between the European Union and about eighty countries of the Asian-Pacific-Caribbean regions, good governance was even recognized as the basis for developmental cooperation.

It is today too early to come to any conclusion about the usefulness of this concept in principle and in practice and the conditions for its successful implementation. The point here is that both the World Bank and the IMF in the past five years, after their initial experience, have started to highlight "ownership," in their jargon, of a program as an important condition of its efforts; in other words, the emphasis is on the positive assumption of responsibility by the political institutions and the stakeholders of the borrowing country for the formulation and implementation of a program.<sup>3</sup>

Of course, the emphasis on ownership and the underlying experience do not bode well for the prospect of regime change by the use of military force against the established institutions of a country.

All these very practical considerations notwithstanding, Professor Reisman's assumptions about the choice by a potential regime changer to act or not to act may turn out to be too sanguine under certain circumstances. The threshold beyond which regime change becomes indispensable may in practice be defined by the urgency of the threat of proliferation of weapons of mass destruction, of terrorism, of mass killings, and of preventing the failing of states, not by the difficult practicalities of regime change.

When we consider the complexities the international community has faced in its multilevel efforts to address the problems of proliferation emanating from North Korea in the past decade, a question necessarily arises about the timing of regime change. Regime change that is premature will be deemed unacceptable. But if the effort comes at a late stage, its chances to succeed, or the price of success, may make regime change impossible. Thus, timing may not only be too late as well as too early, and Professor Reisman may wish in a broader study to turn to the temporal aspect of regime change in more detail.

My last comment concerns Professor Reisman's position that early involvement of the United Nations in the war against Iraq would have made no difference when it came to the tasks of rebuilding Iraq and of introducing a more democratic form of government. Professor Reisman supports his view by reference to the lack of respect for the United Nations as it became apparent in Iraq in the attack on its headquarters in August 2003.

I think we all agree that this attack itself belongs to those dark hours about which Secretary-General Annan spoke. This is true not just because of the attack itself but more because of the almost nonexistent reaction of the international community, which treated the attack as a kind of normal incident in an ongoing war. Of course, those who founded the United Nations in

<sup>3</sup> See James M. Boughton and Alex Mourmouras, *Is Policy Ownership an Operational Concept?* (IMF Working Paper WP/02/72, 2002).

1945 had a totally different vision of its importance and strength, and the weak reaction of the international public opinion in August 2003 indeed marked a very low point in esteem for the United Nations.

However, this fact should by no means be seen to indicate that a UN stamp of approval for the war would not have had any effect on the process of reconstruction, and in particular on the willingness and the ability of the “counter-coalition of the willing” to impede a speedy and successful reconstruction. This is a speculative matter, but I submit that approval of the war by the United Nations would have made it much more difficult for the counterforces to act in a sustained manner. Global public opinion and the complex regional dynamics of support or rejection of the war and of the process of reconstruction would have occurred in a different setting, the dynamics of which would likely have facilitated the post-conflict process.

This is not to deny that from the U.S. point of view the war itself might have been more complex if there had been early UN involvement than it was as it was actually carried out,<sup>4</sup> and that the nature of reconstruction would have been different in a setting in which the United Nations played a major role. I am not sure whether and how such considerations would have affected the U.S. process of decision-making about the war if the actual difficulties and sacrifices in rebuilding Iraq had been known in advance. In any event, there are lessons to be learned from the last year in Iraq for any future effort to plan and to design a regime change by force.

<sup>4</sup> In a strictly military-operational sense, the experience of U.S. commanders of the need to coordinate on a daily basis with third states was mixed even during NATO operations in Kosovo.